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# Reformulating the common law rules on the recognition and enforcement of foreign judgments

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*This article revisits the English common law rules on the recognition and enforcement of foreign judgments in personam. It seeks to demonstrate that, mainly due to the narrow conception of the foreign courts' 'international jurisdictional competence', the operation of this aspect of the English conflict-of-laws rules gives rise to problematic outcomes. Subsequently, the article proceeds to identify and evaluate three of the main doctrinal models which have been proposed in response to these shortcomings. It is contended that, despite their virtues, ultimately, none of these models provides the desirable basis for recasting the law. The article's main contribution is, therefore, to advance an alternative approach for the reformulation of the recognition-and-enforcement regime at common law. In this regard, it is argued that the foreign courts' international jurisdictional competence should be defined more broadly as to include the jurisdictional 'gateways', presently codified within CPR PD 6B para 3.1.*

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## INTRODUCTION

One of the most significant considerations for a would-be claimant ('A'), when contemplating whether to commence cross-border commercial proceedings, is whether, if successful, the court's judgment would be enforceable against the assets of the prospective defendant ('B'). Indeed, in purely practical terms, there is little point in going through the trouble and expense of bringing the action unless A is confident that B has sufficient assets to satisfy the court's judgment. In the modern world, where businesses and individuals are ever more mobile, and their civil and commercial dealings frequently span borders, it is increasingly common for would-be defendants to have assets in more than one jurisdiction. As such, it would not be unusual if B's assets in the forum where A is seeking to bring the action would prove to be insufficient to satisfy a potential award in A's favour. In those circumstances, A (now the 'judgment creditor') would have to seek to enforce the ruling against the assets of B (now the 'judgment debtor') in a foreign state. Whether that aim could

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be achieved, in turn, depends on the conflict-of-laws rules of the forum in which the judgment is sought to be given effect to.

At its broadest, this article is concerned with the English law's approach to the recognition and enforcement of foreign judgments *in personam*. Depending on where the original court is located, the relevant principles in this context are to be found in the following sets of rules: (i) Chapter III of the Brussels Ia Regulation;<sup>1</sup> (ii) the Administration of Justice Act 1920; (iii) the Foreign Judgments (Reciprocal Enforcement) Act 1933; and, (iv) the common law rules. The conflict-of-laws rules within Chapter III of the Brussels Ia Regulation are consulted in relation to judgments rendered by the courts of the Member States of the European Union on matters that fall within the material scope of the Regulation.<sup>2</sup> The provisions within the 1920 Act are referred to in those instances in which the judgment in question originates from courts within some Commonwealth jurisdictions. The 1933 Act governs the recognition and enforcement of foreign judgments from jurisdictions – which include, some EU Member States,<sup>3</sup> non-European, and Commonwealth states – that have bilateral enforcement agreements with the United Kingdom. The common law rules for the recognition and enforcement of foreign judgments – which form the basis for the provisions within the 1920 and 1933 Acts – apply to judgments awarded by courts of foreign countries which do not feature in the list of states under the other three regimes.

The more specific aim of the discussion which follows is to revisit the English common law rules on the recognition and enforcement of foreign judgments *in personam*.<sup>4</sup> The relevant modern-day principles in this area have been in existence since the 1870 cases of *Godard v Grey*,<sup>5</sup> and *Schibsby v Westenholz*.<sup>6</sup> According to these principles, a final and conclusive judgment, excluding those for tax or penalty, can be enforced in England, so long as it has originated from a foreign court that, under the English conflict of laws, has 'international jurisdictional competence' to render that judgment.<sup>7</sup> In so far as recognition of foreign judgments at common law is concerned, similar to enforcement, the judgment in question must be shown to have been final and conclusive and handed down by a jurisdictionally competent court. Additionally, though, the English court should be persuaded that the original court's judgment was on the merits, creating a cause-of-action and issue

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<sup>1</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.

<sup>2</sup> Almost identical rules govern the recognition and enforcement in England of judgments originating from Iceland, Norway, and Switzerland: Title III of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 ('Lugano II Convention').

<sup>3</sup> In relation to judgments from courts of these states in civil and commercial matters, the provisions within the 1933 Act are superseded by Chapter 3 of the Brussels Ia Regulation.

<sup>4</sup> Strictly speaking, there is a difference between the *recognition* of a foreign judgment, on the one hand, and its *enforcement*, on the other: eg, Lord Collins of Mapesbury et al *Dicey, Morris & Collins on the Conflict of Laws* (London: Sweet & Maxwell, 15<sup>th</sup> ed, 2012) paras 14-002-14-006. However, this distinction is overlooked for the purposes of this article.

<sup>5</sup> (1870) LR 6 QB 139.

<sup>6</sup> (1870) LR 6 QB 155.

<sup>7</sup> Eg, A Briggs, *Civil Jurisdiction and Judgments* (Abingdon: Informa Law from Routledge, 6<sup>th</sup> ed, 2015) para 7.46; *Dicey, Morris & Collins*, above n 4, paras 14R-020 and 14R-054; J Hill and A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Oxford: Hart Publishing, 4<sup>th</sup> edn, 2010) para 12.2.1.

estoppel. Subject to a number of defences,<sup>8</sup> which are the same for both enforcement and recognition, foreign judgments which meet these requirements are given effect to in England.

Although the common law rules in this area are of long standing, they have been subjected to withering criticisms within the academic and judicial circles. There can be few areas within English private international law that have been described as being ‘hopelessly anachronistic’,<sup>9</sup> ‘fundamentally suspect’,<sup>10</sup> in ‘need of re-examination and fundamental overhaul’,<sup>11</sup> ‘chauvinistic and of questionable merit’,<sup>12</sup> ‘difficult to justify’,<sup>13</sup> and having ‘little to recommend it at policy level’.<sup>14</sup>

As this article seeks to highlight, the main cause for these criticisms derives from the narrow way in which the recognition-and-enforcement regime at common law defines foreign courts’ jurisdictional competence. Over the years, and in response to this problem, at least three different models for reforming the law have been proposed by commentators. For the most part, they have sought to broaden the conception of the foreign courts’ international jurisdictional competence. However, as the discussion below attempts to demonstrate, despite their virtues, ultimately, none of these reform options provides the compelling doctrinal basis for reformulating this aspect of English private international law. The article’s main contribution is, therefore, to advance a novel path forward for reforming the common law rules on the recognition and enforcement of foreign judgments. In this respect, it is argued that the foreign courts’ international jurisdictional competence should be defined more broadly as to include the jurisdictional ‘gateways’ presently codified within paragraph 3.1 of Practice Direction 6B under the Civil Procedure Rules (hereinafter ‘CPR PD 6B para 3.1’).

The main body of this article comprises four parts. Part 1 briefly outlines the current law on the recognition and enforcement of foreign judgments at common law. Part 2, then, highlights some of the problematic implications which arise from the law’s operation in this field. Part 3 advances the discussion by identifying and analysing three main models for reforming the law, which have been proposed over the past three decades. Finally, Part 4 seeks to put forward an alternative reform option which, it is argued, provides the most fruitful doctrinal avenue for the reformulation of the recognition-and-enforcement regime at common law.

## 1. THE RECOGNITION-AND-ENFORCEMENT REGIME AT COMMON LAW

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<sup>8</sup> For a detailed discussion of the available defences at common law see, eg, *Civil Jurisdiction and Judgments*, above n 7, paras 7.66-7.74.

<sup>9</sup> J Harris, ‘Recognition of Foreign Judgments at Common Law – The Anti-Suit Injunction Link’ (1997) 17 OJLS 477 at 498.

<sup>10</sup> J Hill and M Ní Shúilleabháin, *Clarkson & Hill’s Conflict of Laws* (Oxford: Oxford University Press, 5<sup>th</sup> edn, 2016) para 3.38.

<sup>11</sup> YL Tan, ‘Recognition and Enforcement of Foreign Judgments’ in KS Teo et al (eds), *Current Legal Issues in International Commercial Litigation* (Singapore: National University of Singapore, 1997) p 326.

<sup>12</sup> D Kenny, ‘*Re Flightlease*: The “Real and Substantial Connection” Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland’ (2014) 63 ICLQ 197 at 197.

<sup>13</sup> *Ibid*, at 201.

<sup>14</sup> O’Donnell J in *Re Flightlease* [2012] IESC 12, at [4].

As indicated at the outset of this discussion, a number of different criteria must be satisfied before a foreign judgment becomes entitled for recognition or enforcement at common law. Arguably, the most significant of these conditions is that the foreign court had international jurisdictional competence to render the judgment. After all, the English courts have long stated that the existence of international jurisdictional competence on the part of the foreign court creates an ‘obligation’ on the judgment debtor which can be upheld in England. Telling, in this regard, is the following passage in Parke B’s judgment in the 1845 case of *Williams v Jones*:

Where a [foreign] court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment [in England] may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.<sup>15</sup>

Put simply, it is the creation of this obligation, rather than a sense of reciprocity or comity with the original courts, which provides the theoretical framework for the recognition and enforcement of foreign judgments at common law. Therefore, in view of its significance, the existing scope of international jurisdictional competence deserves closer attention. Though no doubt important, due to the overall lack of controversy surrounding the other requirements for giving effect to foreign judgments, it is unnecessary for present purposes to discuss them in any detail.

By way of background, it should be noted that, under the common law rules in this area, it is immaterial that the foreign court’s assertion of jurisdiction, in the original hearing, had been premised on a particular provision within its jurisdiction rules.<sup>16</sup> Rather, it has to be established that the foreign court had jurisdiction, as defined within the *English* conflict-of-laws rules.<sup>17</sup> The relevant provisions in this context are helpfully summarised in the following passage, in the 15<sup>th</sup> edition of *Dicey, Morris & Collins*, published in 2012:

a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

‘First Case – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second Case – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case – If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case – If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the

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<sup>15</sup> (1845) 13 M & W 628, 633. See, also, *Godard*, above n 5, and *Schibsby*, above n 6.

<sup>16</sup> Eg, *Sirdar Gurdyal Singh v The Rajah of Faridkote* [1894] AC 670. See, generally, *Dicey, Morris & Collins*, above n 4, para 14-055.

<sup>17</sup> Eg, *Buchanan v Rucker* (1808) 9 East 192.

proceedings, to submit to the jurisdiction of that court or of the courts of that country.’<sup>18</sup>

A closer inspection of this passage illustrates that, under the common law rules on the recognition and enforcement of foreign judgments, there are essentially two main situations where a foreign court is regarded as being jurisdictionally competent. These arise when the judgment debtor *submitted* to the foreign proceedings, or was *present* in the foreign forum when the proceedings were commenced.

In the main, the scope of submission is reasonably clear. As highlighted in the above quotation from *Dicey, Morris & Collins*, the English courts have little difficulty in finding submission on the part of the judgment debtor if there is evidence that he had voluntarily appeared before the original court<sup>19</sup> or, failing that, he had contested the dispute on its merits.<sup>20</sup> Furthermore, in the context of a contractual dispute, the judgment debtor would be considered as having submitted to the jurisdiction of the awarding court if the agreement contains a choice-of-court clause in its favour.<sup>21</sup> This particular instance of submission appears to have been expanded by the Privy Council in its 2016 decision in *Vizcaya Partners Ltd v Picard*.<sup>22</sup> Following this ruling, and in principle, the judgment debtor’s agreement to consent to the awarding court’s jurisdiction could be *implied* from the overall circumstances of the case, including a clause which has subjected the agreement to the law of the territory in which the original court is based.

Equally clear is the confines of presence. In order to establish that the foreign court was jurisdictionally competent, and following the Court of Appeal’s leading decision in *Adams v Cape Industries*,<sup>23</sup> all that the judgment creditor is required to show is that, at the time of the commencement of the original proceedings, the judgment debtor was present within the foreign court’s domain. In the case of individual judgment debtors, physical presence is enough to afford jurisdictional competence to the foreign court. As for companies, if the judgment debtor performed its functions from a set location within the territory of the original court (or through an agent based in that forum), the foreign court would be considered as having had jurisdiction under the English conflict-of-laws rules. However, a company’s exporting of goods from where it is based into another country does not make it present in the importing country. Similarly, in the context of online transactions, the fact that a company based in country A sells goods, through its website, in country B does not make it present in country B.<sup>24</sup>

In short, at least in practical terms, the foreign courts’ international jurisdictional competence, in the context of recognition-and-enforcement cases at common law, has a clear

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<sup>18</sup> *Dicey, Morris & Collins*, above n 4, para 14R-054 (citations omitted).

<sup>19</sup> Eg, *Guiard v De Clermont & Donner* [1914] 3 KB 145.

<sup>20</sup> *Emanuel v Symon* [1908] 1 KB 302.

<sup>21</sup> *Ibid*.

<sup>22</sup> [2016] UKPC 5; [2016] 3 All ER 181. Noted, H Kupelyants, ‘Implication of Jurisdiction Agreements’ (2016) 75 CLJ 216.

<sup>23</sup> [1990] Ch 433.

<sup>24</sup> *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328; [2010] Ch 503, at [192], per Jacob LJ. This part of the court’s decision survived the Supreme Court’s reversal of the ruling: [2011] UKSC 39; [2012] 1 AC 208. See *Dicey, Morris & Collins*, above n 4, para 14-066.

and settled definition. This state of affairs, in turn, means that the principles governing the recognition and enforcement of foreign judgments have the advantage of being largely predictable for both the judgment debtor and creditor.

## 2. PROBLEMS ARISING FROM THE EXISTING RECOGNITION-AND-ENFORCEMENT REGIME AT COMMON LAW

Notwithstanding the clarity in the approach at common law to the recognition and enforcement of foreign judgments, over the years, scholars and judges in the field have trenchantly criticised it. Much (if not all) of these criticisms have been aimed at the way in which the English courts have defined international jurisdictional competence on the part of foreign courts. For example, it has been observed that, as well as having a ‘very restrictive meaning’,<sup>25</sup> the concept is premised on the assumption of a ‘very narrow, territorial notion of jurisdiction’.<sup>26</sup> Likewise, in the Irish Supreme Court’s 2012 ruling in *Re Flightlease*, O’Donnell J stated that the relevant national regime for the recognition and enforcement of foreign judgments in Ireland – which is essentially identical to the common law rules in England – ‘has little to recommend it at policy level other than the fact that it is ... known and therefore predictable.’<sup>27</sup> In other words, the instances which, *ceteris paribus*, create an obligation on the part of the English courts to give effect to foreign judgments are considered to be too few.

As a result, it is argued that the obligation theory’s narrow scope under the relevant English common law principles has led to the creation of at least three problems. First, and from a conceptual viewpoint, there is an inconsistency in the way in which the English law defines international jurisdictional competence: the notion’s ambit is considerably wider in assertion-of-jurisdiction than in recognition-and-enforcement cases. There is no evidence to suggest that this gap in definitions exists due to a conscious effort on the part of the English courts. Rather, it is a historical hangover from the era when the modern-day principles underpinning the recognition and enforcement of foreign judgment at common law were first articulated. As noted by the authors of the fifth edition of *Clarkson & Hill’s Conflict of Laws*, published in 2016:

the foundations of the common law rules relating to foreign judgments were laid in the second half of the nineteenth century when the primary bases of the English jurisdiction were presence and submission. At this time there was only a limited form of ‘long-arm’ jurisdiction, introduced by the Common Law Procedure Act 1854, and the doctrine of forum non conveniens was not even a glimmer in the eye of the House of Lords. It is hardly surprising that, when deciding whether or not to enforce a foreign judgment, the courts in the nineteenth century looked to see whether the defendant had been present in the country of origin or had submitted to the jurisdiction of its courts.<sup>28</sup>

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<sup>25</sup> Tan, above n 11, at 290.

<sup>26</sup> Kenny, above n 12, at 200.

<sup>27</sup> Above n 14, at [4].

<sup>28</sup> Hill & Ní Shúilleabháin, above n 10, para 3.36.

In other words, since the mid-nineteenth century, and when entertaining international commercial disputes, the English courts' conception of international jurisdictional competence has been extended. However, the notion's scope, in recognition-and-enforcement cases, has remained much the same as that set out in decisions such as *Godard* and *Schibsby* in the 1870s. This inconsistency in defining competence has been subjected to criticism. Most notably, Professor Briggs has been critical of the lack of coherence in the manner in which international jurisdictional competence is defined within the English conflict-of-laws rules, arguing that 'the case for reuniting the two areas is a strong one.'<sup>29</sup>

The lack of expansion in the meaning of international jurisdictional competence in recognition-and-enforcement cases leads to a second problem with the common law principles in this field. Through their narrow definition of the foreign courts' competence, the current private-international-law principles in this area are open to the charge of having insufficient trust in the foreign courts' civil-litigation processes. Indeed, some have described the recognition-and-enforcement regime at common law as being 'chauvinistic'.<sup>30</sup> The extent of this lack of trust becomes especially pronounced when one compares the common law rules with their counterpart provisions under the Brussels Ia Regulation.<sup>31</sup> Subject to a limited number of defences,<sup>32</sup> in the context of a civil-and-commercial dispute,<sup>33</sup> a judgment rendered by a court within an EU Member State is entitled to recognition and enforcement in England. The relevant rules under the Brussels Ia Regulation leave no room for the enforcing court to second-guess the awarding court's adjudicatory competence in the original hearing. As such, there is no requirement that the court in question should have had international jurisdictional competence, as defined within the English common law rules; its judgment would be given effect to, irrespective of the jurisdictional ground(s) on which the decision was made. This state of affairs is not only confined to cases in which the court of the member state has jurisdiction based on the provisions in Brussels Ia; it is also the case where the basis for the original court's assertion of jurisdiction was its national rules. It is, of course, true that the justification for this more-trusting attitude towards the courts of EU Member States is rooted in the existence of the underpinning agreement – now enshrined in the Brussels Ia Regulation – for the mutual recognition and enforcement of foreign judgments across the Member States. Nevertheless, and as identified by Professor Harris,<sup>34</sup> it is questionable whether the existence of such a disparity between (what is in effect) the trustworthiness of the civil-litigation mechanisms in the EU-based courts, on the one hand, and those in legal systems elsewhere, on the other, is indeed acceptable.

The third (and rather more practical) problem with the application of the current recognition-and-enforcement regime at common law is that it tends to be overly protective of

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<sup>29</sup> A Briggs, 'Which Foreign Judgments Should We Recognise Today?' (1987) 36 ICLQ 240 at 240.

<sup>30</sup> Kenny, above n 12, at 197.

<sup>31</sup> For a more detailed discussion of these rules, see *Civil Jurisdiction and Judgments*, above n 7, paras 7.03-7.41.

<sup>32</sup> Brussels Ia Regulation, Ch III, Section 3(2). For more discussion on the scope and operation of these defences see *Civil Jurisdiction and Judgments*, above n 7, para 7.40.

<sup>33</sup> Except, of course, for those disputes with subject matters that fall within Art.1(2)(a)-(f) of the Brussels Ia Regulation.

<sup>34</sup> Harris, above n 9, at 498.



the interests of judgment debtors. Once again, a brief comparison of the respective positions under the common law and Brussels-inspired rules in this field is illustrative of the extent of this problem. Under the Brussels model, a judgment rendered by a Member State court in the context of a civil-and-commercial claim is *prima facie* capable of recognition and enforcement in England. Practically speaking, the judgment debtor's sole means of opposing the judgment being given effect to is to rely on one of the defences set out in Section 3(2) of Chapter III of the Brussels Ia Regulation. However, the requirement under the common law rules that the foreign court must have been jurisdictionally competent, and the English court's narrow interpretation of competence, makes it considerably easier for a judgment debtor to escape from the foreign court's judgment. It is recalled that, all else being equal, the English court would recognise and enforce the foreign ruling only if the judgment debtor had submitted to the original court's jurisdiction, or had been present in the forum when those proceedings had been commenced. It is, consequently, not difficult to see that a prospective judgment creditor would much rather prefer to commence litigation in a Member State of the European Union than a country outside it.

While the fact that the common law principles on the recognition and enforcement of foreign judgments are reasonably straightforward and longstanding is commendable, there are nonetheless clear conceptual and practical problems with their application. As the discussion in this part has sought to highlight, these shortcomings are the direct consequences of the English courts' restrictive interpretation of international jurisdictional competence on the part of the foreign courts. The next part of the discussion proceeds to identify and analyse the main reform options that have been proposed in the past three decades in response to these problems.

### 3. THE PROPOSED OPTIONS FOR REFORMING THE COMMON LAW RECOGNITION-AND-ENFORCEMENT REGIME

Over the past 30 years, at least three different options for reformulating the common law rules on the recognition and enforcement of foreign judgments have been proposed by commentators – and one them has been adopted in Canada. These are: (i) the 'natural forum' or 'real and substantial connection' model; (ii) the 'anti-suit injunction' model; and (iii) the 'local finality' model. For the most part, they have sought to expand the bases on which a foreign court will be regarded as being jurisdictionally competent. The aim of this part of the discussion is to introduce these reform options and analyse which (if, indeed, any) of them provides the most effective doctrinal means through which to reformulate the common law rules in England on the recognition and enforcement of foreign judgments.

For the purposes of the analysis here, it is important to identify the broader policy goals which the relevant principles in this area should seek to uphold. In this context, at least two policy considerations are incontrovertibly pertinent. First, the recognition-and-enforcement regime at common law must be certain and predictable. Second, it should treat the competing rights of the judgment debtors and creditors even-handedly. As discussed

earlier, the English courts' conception of the foreign courts' international jurisdictional competence is clear and straightforward. In a given case, all that the judgment creditor has to do is to establish that the judgment debtor had submitted to the original proceedings, or was present in the country of origin when the substantive proceedings were initiated. At the same time, the restrictiveness with which the foreign courts' competence is presently defined lends force to the accusation that the law in this area is overly pre-occupied with the rights of judgment debtors and, hence, does not adequately protect the interests of judgment creditors. In these circumstances, the most desirable model for reformulating the law, it is argued, would be one which would achieve a greater parity between the rights of the judgment debtors and creditors, on the one hand, while not rendering the law's application unduly uncertain, on the other.

It is against these benchmarks that the (un)attractiveness of the three options for reforming this area of the law should be judged. As the assessment below seeks to illustrate, the proposed solutions to the problems currently affecting the common law recognition-and-enforcement regime are self-evidently innovative and rigorously argued. Nevertheless, in spite of their advantages when compared to the existing legal principles, it is argued that, in the final analysis, each of these models falls short of providing the most compelling doctrinal basis for reformulating the law.

#### **(a) The natural forum or real and substantial connection model**

First to consider is the natural forum or real and substantial connection model. This reform option was initially proposed by Professor Briggs in an article published in the *International & Comparative Law Quarterly*,<sup>35</sup> not long after the English House of Lords' formal recognition of the *forum non conveniens* doctrine in England in *Spiliada Maritime Corporation v Cansulex Ltd* in 1986.<sup>36</sup> In *Spiliada*, the House of Lords held that the English court has a discretion to relinquish its (otherwise) soundly-founded jurisdiction if an available foreign court is shown to be the dispute's natural (or appropriate) forum.<sup>37</sup> It was within the context of this decision which Professor Briggs discussed the question of reformulating the recognition-and-enforcement regime at common law.

As discussed in the previous part, Professor Briggs was particularly concerned with the existence of a gap between the circumstances in which the English court has international competence and those in which, in a recognition-and-enforcement case, a foreign court is regarded as being a court of competent jurisdiction. In view of the *Spiliada* decision, he observed that

as we now claim and retain jurisdiction on grounds approximating to submission or the fact that England is the natural forum, we should in like manner adapt our view of what

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<sup>35</sup> Briggs, above n 29.

<sup>36</sup> [1987] AC 460.

<sup>37</sup> Though much more in use at the time when the *Spiliada* ruling was handed down, the term 'natural forum' has been largely replaced by the phrase the 'appropriate forum'.

constitutes jurisdiction “in the international sense” when we are called upon to recognise a foreign judgment.<sup>38</sup>

Accordingly, Professor Briggs advocated for the common law recognition-and-enforcement rules to be revised so that if, based on the English conflict-of-laws rules, the foreign court is shown to be the dispute’s natural forum, then it should be deemed to have international jurisdictional competence.

This model for the recognition and enforcement of foreign judgments *in personam* is yet to find favour amongst English judges.<sup>39</sup> However, it has been adopted in Canada. *De Savoye v Morguard Investments Ltd*,<sup>40</sup> an interprovincial case decided in 1990, was the first occasion where this new doctrinal framework was applied. Until then, the Canadian courts – whether in interprovincial or international cases – had essentially applied the same set of principles for giving effect to foreign judgments as those of the English common law. In *Morguard*, however, the Supreme Court of Canada stated that, in light of the socio-economic changes and the emergence of a ‘world community’, the common law rules, as highlighted in cases such as *Godard* and *Schibsby* in the 1870s, were too narrow.<sup>41</sup> More specifically, in the context of interprovincial cases, the court stated that the recognition-and-enforcement regime at common law flew ‘in the face of the obvious intention of the [Canadian] Constitution to create a single country.’<sup>42</sup> In these circumstances, the Supreme Court of Canada expanded the scope of international jurisdictional competence. Under the new approach, a judgment creditor, who could not show that the judgment debtor had submitted to the original hearing, or was indeed present in the forum when they were commenced, could still surmount the international-jurisdictional-competence hurdle if he could establish that the awarding court had a “real and substantial connection” with the dispute.<sup>43</sup> In this respect, and put simply, the original court would be regarded as having a real and substantial connection if it was the dispute’s centre of gravity.

More than a decade later, in the 2003 case of *Beals v Saldanha*,<sup>44</sup> the Supreme Court of Canada confirmed that the approach adopted in *Morguard* also provided the basis for the recognition and enforcement of foreign judgments in Canada. Much has been written concerning the court’s decision in *Beals*.<sup>45</sup> Nonetheless, for the purpose of this discussion, it would be helpful to revisit some aspects of the case. In *Beals*, the judgment debtors, S, were Ontarian residents who owned a plot of land in Florida. They sold the land to the judgment creditors, B, who resided in Florida. A dispute arose between the parties which led to B suing S in Florida. S did not participate in the proceedings. In due course, the Floridian court

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<sup>38</sup> Briggs, above n 29, at 248-249.

<sup>39</sup> The approach does, however, seem to have been applied by the English court in the context of the enforcement of foreign divorce decrees: *Indyka v Indyka* [1969] 1 AC 33.

<sup>40</sup> [1990] 3 SCR 1077. See, HP Glenn, ‘Foreign Judgments, the Common Law and the Constitution’ (1992) 37 McGill L J 537.

<sup>41</sup> [1990] 3 SCR 1077, at [34], per La Forest J.

<sup>42</sup> Ibid, at [36].

<sup>43</sup> Ibid, at [51].

<sup>44</sup> [2003] 3 SCR 416.

<sup>45</sup> See, eg, J Walker, ‘The Great Canadian Comity Experiment Continues’ (2004) 120 LQR 365 and SGA Pitel, ‘A Modern Approach to Enforcing Foreign Judgments’ [2004] LMCLQ 289.

rendered a default judgment in B's favour. Unfortunately for S, the judgment debt had increased more than tenfold by the time the matter of recognition and enforcement of the Floridian judgment came before the Supreme Court in Canada. Throughout the course of the litigation, the parties had accepted that the real and substantial connection test was the relevant yardstick against which the Canadian courts would give effect to interprovincial *and* foreign judgments. Notwithstanding this concession, the Supreme Court expressed its view on the matter. In this regard, Major J considered that '[w]hile there are compelling reasons to expand the test's application, there does not appear to be any principled reason not to do so.'<sup>46</sup> He, then, went on to state that '[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law', and, to achieve this end, the approach in *Morguard* 'can and should be extended beyond the recognition of interprovincial judgments'.<sup>47</sup> Consequently, provided that there is a 'significant connection' between the original proceedings and the original court, the foreign court would be regarded as being jurisdictionally competent for the purposes of the common law recognition-and-enforcement principles in Canada.<sup>48</sup> On the facts of the case, there was an overall acceptance that, even but for the parties' concession on the matter, Florida would still have been found to be the natural forum for entertaining the dispute. In the end, it was the differing views on the applicability of the defences which led the Supreme Court to decide, by a six-to-three majority,<sup>49</sup> to enforce the Floridian judgment.

At first blush, the natural forum model appears to provide a plausible basis for reformulating the common law principles on the recognition and enforcement of foreign judgments. There is an attraction in upholding a judgment rendered by a court which is, effectively, the 'home' of the dispute. Moreover, were this reform option to be adopted in England, it would have the advantage of helping to bring about a greater degree of consistency in the way in which jurisdictional competence is defined in assumption-of-jurisdiction and recognition-and-enforcement cases. Lastly, by broadening the range of instances which afford the foreign courts jurisdictional competence, the natural forum model has the advantage of levelling the playing field in so far as the interests of judgment debtors and creditors are concerned.

Be that as it may, it is argued that a framework of this nature ought not to be adopted by English law, for the overriding reason that it is liable to lead to significant levels of uncertainty for the litigants. As discussed earlier, the application of the *Spiliada* test is at the heart of the operation of the natural forum model for the recognition and enforcement of foreign judgment. As a result, it would be for the judgment creditor to persuade the English court that the foreign forum, where the original judgment had been handed down, was the more appropriate forum – ie, it was the dispute's centre of gravity and able to dispose of the parties' claim justly. However, over the course of its existence, the predictability of the *Spiliada* doctrine's application in the context of the (non-)exercise of jurisdiction in England

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<sup>46</sup> *Beals*, above n 44, at [19].

<sup>47</sup> *Ibid*, at [28].

<sup>48</sup> *Ibid*, at [32].

<sup>49</sup> Majority: Major, McLachlin CJC, Gonthier, Bastarache, Arbour, and Deschamps JJ; Dissents: Binnie, Iacobucci, and LeBel JJ.

has, in fact, been in question.<sup>50</sup> It is difficult to see how – short of a mini-trial on where the appropriate foreign forum in the eyes of the *English* court is – the litigants in the original proceedings are likely to be able to organise their affairs.<sup>51</sup> Indeed, in a case comment, on the Canadian Supreme Court’s decision in *Beals v Saldanha*, Professor Pitel observed that the court’s decision to embrace the natural forum model rendered the law ‘less certain than the traditional’ position, thereby requiring the ‘defendants to assess, at the outset of the litigation, whether or not a court called upon to enforce the judgment will eventually conclude that the connection [with the original court] was sufficient.’<sup>52</sup> As such, it would seem scarcely appealing to upset the existing levels of certainty in the operation of the current common law rules on the recognition and enforcement of foreign judgments by reformulating it in accordance with an open-textured doctrine whose application could lead to inconsistency in decision making.<sup>53</sup>

### **(b) The anti-suit injunction model**

The second proposed framework for reforming the common law rules on the recognition and enforcement of foreign judgments is the so-called ‘anti-suit injunction’ model. Unlike the natural forum model, this reform option has not been embraced by courts. The anti-suit injunction model was first advocated by Professor Harris in an article published in the *Oxford Journal of Legal Studies* in 1997.<sup>54</sup> In a similar vein to Professor Briggs, Professor Harris favoured a wider conception of the foreign courts’ international jurisdictional competence. Accordingly, he proposed bringing together the common law rules in this area, on the one hand, and those concerning the assumption of jurisdiction, on the other.<sup>55</sup> He observed that ‘[f]ears about the quality of justice handed out in foreign courts are far less than at the time of the *Schibsby* decision’, and that, in view of the Canadian developments on the subject, ‘international harmony and commercial practicality’ should be the driving forces behind the English law’s reformulation of the recognition and enforcement rules for foreign judgments at common law.<sup>56</sup>

However, Professor Harris preferred a wider interpretation of the foreign courts’ international jurisdictional competence, than the one envisaged under the natural forum model. In this respect, he relied on the principles for granting anti-suit injunctions, as articulated in the Privy Council’s landmark ruling in *Societe Nationale Industrielle*

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<sup>50</sup> For criticisms of this aspect of the *Spiliada* test’s application, see, eg, DW Robertson, ‘*Forum Non Conveniens* in America and England: “A Rather Fantastic Fiction”’ (1987) 103 LQR 398, J Hill, ‘Jurisdiction in Civil and Commercial Matters: Is There a Third Way?’ [2001] CLP 439, and (specifically with regard to the doctrine’s second limb) A Arzandeh, ‘Should the *Spiliada* Test Be Revised?’ (2014) 10 J Priv Int L 89.

<sup>51</sup> A similar concern has been raised in P Rogerson, *Collier’s Conflict of Laws* (Cambridge: Cambridge University Press, 4<sup>th</sup> edn, 2013) p 249.

<sup>52</sup> Pitel, above n 45, at 291 (citations omitted).

<sup>53</sup> Hill & Ní Shúilleabháin, above n 10, para 3.39.

<sup>54</sup> Harris, above n 9.

<sup>55</sup> *Ibid*, at 478.

<sup>56</sup> *Ibid*, at 482.

*Aerospatiale v Lee Kui Jak*,<sup>57</sup> to reformulate the law. Based on this approach, the foreign court would be deemed jurisdictionally competent, unless the judgment debtor could show that England was the natural forum and the original proceedings had been ‘vexatious and oppressive’. According to Professor Harris, ‘[i]f (given jurisdiction *in personam*) we would not be prepared to grant’ an order to restrain the original proceedings before the foreign court, ‘then the argument will be that we should recognize or enforce the judgment of that foreign court.’<sup>58</sup>

Evidently, the anti-suit injunction model has certain advantages when compared with the current common law recognition-and-enforcement principles. To begin with, and were it to be adopted, it would considerably expand the scope of international jurisdictional competence on the part of the foreign courts. This development would, in turn, address the problem, highlighted earlier in this discussion, of the lack of parity in the treatment of the competing interests of the judgment creditors and debtors caused by the current laws in this area. What is more, by relying on the anti-suit injunction test in this context, Professor Harris’s reform option has the attraction of affording more respect to the original courts’ decision making than the existing principles.

Nevertheless, it is argued that the anti-suit injunction model, too, suffers from a number of shortcomings which, in the end, make it an unsuitable doctrinal avenue through which to refine the recognition-and-enforcement regime at common law. The first weakness derives from the model’s reliance on the concept of natural forum. As discussed earlier, the concept is open-textured and its application is liable to give rise to unpredictable outcomes. Indeed, in the course of advancing the case for adopting the anti-suit injunction model, Professor Harris conceded that it was ‘undeniable that the concept of the natural forum is ... a rather vague one’.<sup>59</sup> Notwithstanding this concession, he went on to observe that, because the natural forum aspect within the anti-suit injunction model was accompanied with the requirement of establishing vexation and oppression on the part of the original court, his preferred test would generate more certain outcomes than the natural forum model.<sup>60</sup> Therefore, Professor Harris contended that, in the context of the anti-suit injunction model for reforming the law, ‘the natural forum will have a considerably less significant role to play’, thereby rendering the ‘injunction-based test ... a lesser threat to certainty’ than the natural forum model.<sup>61</sup>

This contention is not entirely persuasive, however. Indeed, it is argued that, in much the same way as the concept of natural forum, vexation and oppression are vulnerable to being criticised for being exceedingly ambiguous. Even a cursory assessment of the relevant legal sources on this deep-rooted notion illustrates the lack of clarity surrounding its meaning. For as long as it can be recalled, English courts have shown a reluctance to provide a clear-cut definition of vexation and oppression. In this regard, the following oft-quoted passage in Bowen LJ’s judgment in the 1882 case of *McHenry v Lewis* is especially illustrative:

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<sup>57</sup> [1987] AC 871.

<sup>58</sup> Harris, above n 9, at 483.

<sup>59</sup> Ibid, at 493.

<sup>60</sup> Ibid, at 494.

<sup>61</sup> Ibid.

it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.<sup>62</sup>

Thus, it is argued that, far from compensating for the inherent vagueness in the concept of natural forum, the ambiguities surrounding what amounts to vexation and oppression are likely to render the test unduly uncertain and hard to predict for the litigants. In short, the anti-suit injunction model does not offer the most compelling path for revising the common law principles for the recognition and enforcement of foreign judgments.

### **(c) The local finality model**

The third (and final) proposed option for reformulating the common law rules on the recognition and enforcement of foreign judgments is the so-called ‘local finality’ model. This arguably less widely-known model was advanced by Professor Tan in 1997.<sup>63</sup> Similar to the anti-suit injunction model, but unlike the natural forum model, the local finality model has not been adopted by the courts. Much like Professors Briggs and Harris, Professor Tan was critical of the existing state of the recognition-and-enforcement regime at common law. In particular, and pointing to the evolution of the rules concerning assertion of jurisdiction in England, he opined that the bases for affording international jurisdictional competence to the foreign court – namely, the judgment debtor’s presence in the forum or submission to the original claim – were ‘outdated (as well as unrealistic)’.<sup>64</sup>

However, Professor Tan went much farther than Professors Briggs and Harris. He fundamentally questioned the rationale for having international jurisdictional competence on the part of the foreign courts, as one of the pre-requisites within the recognition-and-enforcement regime at common law.<sup>65</sup> In seeking to refine the law in this area, Professor Tan proposed that the mere ‘finality’ of the foreign judgment should be ‘the key consideration’, in deciding whether to give effect to it.<sup>66</sup> In his view, ‘[f]inality is reason enough for enforcing a foreign judgment, so that irrespective of the source of the judgment, it should be valid if it can be accorded the status of finality.’<sup>67</sup> However, mindful of the fact that a development in the law along these lines may be regarded as tilting the balance disproportionately in favour of the judgment creditor, Professor Tan suggested that the defences available to the judgment debtor should be refined so to prevent the enforcement of a final foreign judgment which will

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<sup>62</sup> (1882) 22 Ch D 397, at 407-408.

<sup>63</sup> Tan, above n 11.

<sup>64</sup> Ibid, at 295.

<sup>65</sup> Ibid, at 294-305.

<sup>66</sup> Ibid, at 297.

<sup>67</sup> Ibid, at 326.

give rise to ‘injustice’ to the judgment debtor.<sup>68</sup> In this respect, he stated that ‘[w]hen the court which is asked to recognize or enforce the foreign judgment is the natural forum for the dispute, it has a duty to see that the judgment is reasonable and achieves substantial justice.’<sup>69</sup> In other words, according to Professor Tan’s approach, where England, as the forum in which the judgment is sought to be given effect to, is most closely connected to the original dispute between the litigants, then it should be able to re-consider any allegations of fraud, breach of natural justice or public policy to ensure that no injustice is done to the parties.

The local finality model is the most radical of the proposed approaches for the reform of the law. At an abstract level, at least, it has some attractive features. First, the local finality model considerably simplifies the process of recognition and enforcement. It, hence, makes it clear that, unless caught by the defences, in a given case, the foreign court’s judgment would, in principle, be entitled to recognition and enforcement in England. Second, compared to the current recognition-and-enforcement regime, and also the natural forum and anti-suit injunction models, it shows the greatest degree of respect for the civil-justice processes of the foreign courts. It is really at the stage concerning the application of the defences that, depending on whether England is the centre of gravity for the original litigation, the English court could second-guess the foreign courts’ decision making.

It is argued that, notwithstanding these positive aspects, the local finality model does not provide the most doctrinally prudent means of reformulating the recognition-and-enforcement regime at common law. In fact, its adoption would lead to at least two serious problems. First, by completely discarding the requirement for the existence of international jurisdictional competence on the part of the foreign courts, this reform option is disproportionately protective of the judgment creditors’ interests. As pointed out earlier, through its modification of the existing defences, the local finality model seeks to pre-empt this consequence. Nevertheless, it is highly improbable that it would be able to adequately protect judgment debtors against potential instances of injustice. After all, according to Professor Tan’s proposal, the scope of the defences would be expanded only if the English court were the natural forum for entertaining the original litigation. In practice, though, there are likely to be more instances in which the English court is not the forum most closely connected to the original dispute. It is contended that, the adoption of the local finality model would lead to a sharp increase in the number of cases where judgment debtors, with assets in England, would face enforcement proceedings in relation to judgments rendered against them, without their knowledge, in the courts of far-flung territories. Thus, there would be conceivably many cases where the potential injustices to judgment debtors, of enforcing a judgment against them in England, would indeed come to pass.

Even if these misgivings are to be discounted, there is a second (and, perhaps, more acute) problem which would arise from reformulating the law in this area along the lines envisaged within the local finality model. Such a step, it is argued, would render the application of the defences – and, in turn, the common law recognition-and-enforcement principles – highly unpredictable. Aside from the ambiguities surrounding the precise

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<sup>68</sup> Ibid, at 312-320.

<sup>69</sup> Ibid, at 326.



meaning of natural forum, which this discussion has already touched on, it is not readily clear how unjust the treatment of the parties in the original proceedings must have been for the judgment to be refused recognition and enforcement in England.

In sum, in seeking to eradicate a number of shortcomings associated with the English courts' existing rules at common law on the recognition and enforcement of foreign judgments, the local finality model creates a host of other (more serious) problems with the law at the defences' stage of the enquiry. For these reasons, it is argued that the English law should not adopt the local finality model.

#### 4. THE WAY FORWARD

The foregoing discussion has attempted to demonstrate that, despite their merits, none of the options for reformulating the common law principles on the recognition and enforcement of foreign judgments that have been proposed over the past three decades stands out as providing the most convincing way forward. As a result, and if it is accepted that attempts should be made to refine this area of law, the next step ought to be towards identifying a viable route through which to pursue reform. To be most effective, this reform option should be one which would help to attain the broader policy objectives, highlighted in the previous part of this article, of certainty and fairness between the parties.

With these considerations in mind, it is argued that it would be most prudent to broaden the scope of international jurisdictional competence, in common law recognition-and-enforcement cases, so to include the jurisdictional gateways presently codified within CPR PD 6B para 3.1. Accordingly, provided that the judgment debtor had proper notice of the proceedings, and regardless of the jurisdictional ground(s) for the foreign court's decision, if the judgment creditor can establish that the connection between the judgment debtor and/or the claim and the foreign court was such that, had it been with England, it would have fallen within one of the gateways within CPR PD 6B para 3.1, the foreign court should be considered jurisdictionally competent. The foreign court's ruling would thus create an obligation on the judgment debtor which, in principle, can be upheld in England. The CPR gateways would supplement presence and submission as the relevant grounds for affording jurisdictional competence to foreign courts. Such an approach to the reformulation of the common law recognition-and-enforcement regime can be labelled the 'corresponding jurisdictional bases' model.

The discussion below begins by assessing the case for adopting this framework. Subsequently, it proceeds to examine whether, in the light of the inevitably expansionary effect of implementing the corresponding jurisdictional bases model, the scope of the defences to the recognition and enforcement of foreign judgments at common law, too, should be reconfigured.

##### **(a) The corresponding jurisdictional bases model: an assessment**

An analysis of the case law and associated academic commentary suggests that there may be grounds for opposing the introduction of the corresponding jurisdictional bases model as the preferred method for revising the common law recognition-and-enforcement regime. To begin with, and as long ago as the 1870s, English courts have emphasised that, in their eyes, only the judgment debtor's submission to the original proceedings before the foreign court, or presence within the forum at the start of the hearing, would render that court's judgment binding on them. In this respect, courts in England have rejected arguments that the fact that a judgment debtor possesses property in the foreign forum,<sup>70</sup> or that the cause of action in question has arisen there,<sup>71</sup> meant that he was bound by the foreign court's judgment. Furthermore, in light of Blackburn J's pronouncements in the *Schibsby* case,<sup>72</sup> leading commentators appear to be unenthusiastic at the prospect of law reform consistent with the corresponding jurisdictional bases model.<sup>73</sup> More recently, in an *obiter* statement in *Rubin v Eurofinance SA*, Lord Collins of Mapesbury underscored that submission and presence are the only bases for jurisdictional competence in recognition-and-enforcement cases, observing that '[t]he English court does not concede jurisdiction in personam to a foreign court merely because the English court would, in corresponding circumstances, have power to order service out of the jurisdiction.'<sup>74</sup> Consequently, any attempt to reformulate the law in accordance with the corresponding jurisdictional bases model may be dismissed as being 'unrealistic'.<sup>75</sup>

The other main ground for opposing the adoption of the corresponding jurisdictional bases model is rooted in the view that the gateways within CPR PD 6B para.3.1 would provide too tenuous a link between the foreign forum and the judgment debtor and/or the claim to render it justifiable for the English court to enforce the foreign court's judgment. The following two hypothetical examples are illustrative of this problem:

1. While on a visit to a trade fair in California, A and B entered a contract. Subsequently, a dispute ensued between the parties which prompted A to begin an action for breach of contract against B in California. Except for the fact that the agreement had been made within California, the parties and/or the dispute have no connection with that forum. In due course, the Californian court hands down its judgment in favour of A. A, then, wants to enforce the Californian court's judgment against B's assets in England. Based on the corresponding jurisdictional bases model, the Californian court would be jurisdictionally competent, in the eyes of the English conflict-of-laws rules, by virtue of the corresponding application of CPR PD 6B para 3.1(6)(a). Thus, *prima facie*, its judgment would be capable of enforcement in England.

2. X and Y entered into a contractual agreement through Z, X's New York-based agent. Sometime thereafter, X commenced breach-of-contract proceedings against Y in New York.

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<sup>70</sup> Eg, *Emanuel*, above n 20.

<sup>71</sup> Eg, *Singh*, above n 16, and *Phillips v Batho* [1913] 3 KB 25.

<sup>72</sup> Above n 6, at 159. See also *Turnbull v Walker* (1892) 67 LT 767.

<sup>73</sup> Eg, *Civil Jurisdiction and Judgments*, above n 7, para 7.60 and *Dicey, Morris & Collins*, above n 4, paras 14–087–14–088.

<sup>74</sup> [2012] UKSC 46; [2013] 1 AC 236, at [127].

<sup>75</sup> Briggs, above n 29, at 246. See, also, A Briggs, *Private International Law in English Courts* (Oxford: Oxford University Press, 2014) para 6.225.

Aside from Z's domicile, no other factor connects the case and/or the parties to New York. In due course, the New York court grants a judgment against Y, which X now seeks to enforce in England. If the corresponding jurisdictional bases model were to be in operation in England, the New York court would be considered as having international jurisdictional competence, pursuant to CPR PD 6B para 3.1(6)(b), and its judgment would be, *ceteris paribus*, enforceable in England.

It is perhaps because of the likelihood of instances like these arising that Professor Briggs has observed that the CPR PD 6B para.3.1 gateways 'in their plain form, do not necessarily connote a strong connection with the ... adjudicating court'.<sup>76</sup>

In some quarters, these two considerations might be regarded as being sufficiently forceful to slam the door firmly in the face of any line of reasoning in favour of reformulating the common law recognition-and-enforcement regime along the lines envisaged by the corresponding jurisdictional bases model. Nevertheless, it is contended that they are in no way impervious to challenge. Consider, in the first place, the reason for opposing this reform option due to the weight of legal authority against it. It is true that English courts have in a long line of cases seemed resistant to the idea of widening the scope of jurisdictional competence in recognition-and-enforcement cases by including the CPR PD 6B para.3.1 gateways. But, as it has been touched on by the editors of *Dicey, Morris & Collins*,<sup>77</sup> this long line of authorities has not been unbroken. In fact, for a period, there was some appetite among judges and commentators for having a wider conception of international jurisdictional competence based on reciprocity in jurisdictional grounds of the foreign and English courts. In this respect, the view was that the foreign court should be deemed jurisdictionally competent if its jurisdiction was rooted in a provision under its laws which mirrored one of (what are now) CPR gateways which would have formed the basis for the English court's jurisdiction, had the case been brought in England. This approach is broadly similar to the corresponding jurisdictional bases model – in that it argued for the inclusion of the CPR gateways within its definition of the foreign courts' jurisdictional competence. But, ultimately, it is narrower because, under the corresponding jurisdictional bases model, the basis for the foreign court's jurisdiction in the original hearing is immaterial in whether the foreign court is competent, in recognition-and-enforcement terms, under English law. Perhaps, the most prominent example of support for giving effect to foreign judgments based on reciprocity of jurisdictional grounds can be found in the following (passing) *obiter* remark in *In Re Dulles' Settlement (No 2)*, where Denning LJ opined that:

I do not doubt that our courts would recognize a judgment properly obtained in the Manx courts for a tort committed there, *whether the defendant voluntarily submitted to the jurisdiction or not*; just as we would expect the Manx courts in a converse case to recognize a judgment obtained in our courts against a resident in the Isle of Man, on his being properly served out of our jurisdiction for a tort committed here.<sup>78</sup>

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<sup>76</sup> *Civil Jurisdiction and Judgments*, above n 7, para 7.60 (citations omitted).

<sup>77</sup> Above n 4, para 14–089.

<sup>78</sup> [1951] Ch 842, at 851 (emphasis added).

Likewise, albeit in a more detailed fashion, in *Travers v Holley*,<sup>79</sup> the English Court of Appeal gave effect in England to a divorce ruling rendered in New South Wales. In outlining the court's reasoning, Hodson LJ stated that '[i]t must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court',<sup>80</sup> because otherwise, 'it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves.'<sup>81</sup> A few years before these decisions, the editors of the 6<sup>th</sup> edition of *Dicey's Conflict of Laws*, published in 1949, had expressed the view that the list of bases for the foreign courts' jurisdictional competence was 'not necessarily exhaustive' and that '[t]he law on the authority to be ascribed to the decisions of foreign tribunals [was] still uncertain, and liable to undergo further development by means of judicial legislation.'<sup>82</sup> They went on to observe that it had been 'obvious that the High Court must in the long run concede to the courts of foreign countries *pretty much the same rights of jurisdiction which it claims for itself*.'<sup>83</sup> Indeed, the statements in *Dulles*, *Travers* and *Dicey's Conflict of Laws* prompted academic interventions in favour of the expansion of the scope of jurisdictional competence in recognition-and-enforcement cases based on reciprocity.<sup>84</sup> Although these judicial and academic pronouncements failed to trigger a change in the law, and were subsequently downplayed,<sup>85</sup> it is nevertheless contended that their existence means that the path for reforming the law by widening the scope of jurisdictional competence to include the CPR jurisdictional gateways has not been insuperably obstructed.

The second claimed reason for resisting the expansion of jurisdictional competence, by including the CPR gateways within its existing ambit, is arguably more questionable. As highlighted in the (extreme) examples, above, not every gateway within CPR PD 6B para 3.1 represents sufficient connection between the judgment debtor and/or the dispute and the forum in question. In the context of recognition and enforcement cases, were the scope of jurisdictional competence to be expanded by adopting sub-paragraphs such as 6(a) or 6(b) in *isolation*, then it would be hard to address the charge that the gateways signify weak connecting factors between the foreign forum and the judgment debtor and/or the claim to justify the recognition and enforcement in England of the foreign courts' judgments. However, as a set of provisions which *collectively* exemplifies a wide range of connecting factors, the gateways do generally represent sufficient connection between the judgment debtor and/or the dispute and the court of origin to warrant the creation of an obligation on the judgment debtor which can be given effect to in England. For example, it is difficult to see why it would be unjust to enforce or recognise in England a judgment rendered by the courts of country X, where: (i) in a contractual claim, the dispute is governed by the law of

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<sup>79</sup> [1953] P 246.

<sup>80</sup> *Ibid*, at 256.

<sup>81</sup> *Ibid*, at 257.

<sup>82</sup> JHC Morris et al *Dicey's Conflict of Laws* (London: Stevens, 6<sup>th</sup> edn, 1949), 354. The bases which afforded foreign courts jurisdictional competence were set out in Rule 68, at 351-352.

<sup>83</sup> *Ibid*, at 362 (emphasis added).

<sup>84</sup> See, eg, GD Kennedy, "'Reciprocity" in the Recognition of Foreign Judgments' (1954) 32 Can Bar Rev 359 and GD Kennedy, 'Recognition of Judgments In Personam: The Meaning of Reciprocity' (1957) 35 Can Bar Rev 123. See, also, GE Cheshire, *Private International Law* (London: Butterworths, 7<sup>th</sup> edn, 1965), 558.

<sup>85</sup> Eg, *In re Trepca Mines Ltd* [1960] 1 WLR 1273 and *Henry v Geopresco International Ltd* [1976] QB 726.

country X,<sup>86</sup> or country X is where the alleged breach of contract has occurred;<sup>87</sup> (ii) in a tortious context, the alleged ‘damage’,<sup>88</sup> or the events giving rise to it,<sup>89</sup> had occurred in country X; or, (iii) in claims about property, the matter in question concerns wholly (or in part) property that is located in country X.<sup>90</sup> Indeed, in a given case, some of these jurisdictional bases actually signify a stronger connection between the judgment debtor and/or the claim and the foreign court than the judgment debtor’s mere presence connotes. Accordingly, and for the most part, the corresponding jurisdictional bases model would enable the English courts to recognise and enforce judgments of courts that have had more than minimal connection with the disputes and/or the judgment debtors.

In addition, there are two other (positive) arguments as to why it would be prudent to adopt the corresponding jurisdictional bases model, notwithstanding the lack of authority in its support. First, the corresponding jurisdictional bases model has many of the virtues of the other three proposed frameworks for revising the law in this area, though, significantly, it does not exhibit their drawbacks. As with the other suggested reform options, this article’s preferred framework seeks to widen the scope of international jurisdictional competence, thereby addressing the problematic implications of the imbalance in the treatment of the competing rights of the judgment creditors and debtors which flow from the present principles. In this respect, the corresponding jurisdictional bases model builds on the natural forum, anti-suit injunction and local finality models. However, and crucially, these improvements are not secured at the cost of imperilling certainty in the operation of the common law recognition-and-enforcement regime. Hence, it is contended that, although in no way without its own shortcomings, on balance, the corresponding jurisdictional bases model provides a more fruitful avenue through which to reformulate the common law principles on the recognition and enforcement of foreign judgments.

The second reason why it would be advantageous to embrace the corresponding jurisdictional bases model is that its adoption would fill the gap which currently exists in the English law’s conception of international jurisdictional competence in assertion-of-jurisdiction cases, on the one hand, and recognition-and-enforcement cases, on the other. It is argued that, by expanding the scope of jurisdictional competence in recognition-and-enforcement cases to include all the English national law rules for asserting jurisdiction in private-international-law disputes, the corresponding jurisdictional bases model would help to achieve greater consistency in the way international jurisdictional competence is defined in England. While there would still be some difference in what amounts to competence in assertion-of-jurisdiction and recognition-and-enforcement cases – because of the operation of the *forum (non) conveniens* doctrine in the former category – it is, nonetheless, argued that this article’s favoured approach would help to render the law in this area more coherent.

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<sup>86</sup> CPR PD 6B para 3.1(6)(c).

<sup>87</sup> CPR PD 6B para 3.1(7).

<sup>88</sup> CPR PD 6B para 3.1(9)(a).

<sup>89</sup> CPR PD 6B para 3.1(9)(b).

<sup>90</sup> CPR PD 6B para 3.1(11). The same observations could also be made about the other gateways which relate to trusts – CPR PD 6B para 3.1(12)–(16) – admiralty – CPR PD 6B para 3.1(17) – breach of confidence or misuse of private information – CPR PD 6B para 3.1(21).

In essence, the foregoing analysis in this part has sought to make the case in favour of reformulating the existing principles at common law concerning the recognition and enforcement of foreign judgments through the adoption of the corresponding jurisdictional bases model. Such revision in the law would lead to the following position: when seeking to recognise or enforce a foreign judgment, the onus would be on the party who seeks to give effect to that judgment to show that the original court was jurisdictionally competent, as defined under the English conflict-of-laws rules. Regardless of the basis for the foreign court's assertion of jurisdiction in the original hearing, the judgment debtor's submission to those proceedings, or presence within the court's territory at the time of the commencement of the hearing would render the foreign court jurisdictionally competent. *But, additionally*, and again irrespective of the jurisdictional ground for the foreign court's ruling, if the nature of the connection between the defendant and/or the claim and the foreign court was such that, had it been with England, it would have fallen within a corresponding CPR gateway, then it should be regarded as having competence, and its judgment should, in principle, be capable of recognition and enforcement in England.

**(b) Should the scope of the common law defences be reconfigured, following the introduction of the corresponding jurisdictional bases model?**

At this juncture, and before concluding the discussion, one further issue must be considered. It concerns the question of whether the existing body of defences to the recognition and enforcement of foreign judgments at common law should be reconfigured, in the event that the corresponding jurisdictional bases model were to be embraced in England. In an article published in 2004,<sup>91</sup> not long after the Supreme Court of Canada's endorsement of the real and substantial connection model in *Beals v Saldanha*, Professor Briggs expressed the view that '[i]t would be curious to say that one may develop a new basis of jurisdictional recognition without regard to the defences which will condition its application in practice.'<sup>92</sup> One of the main reasons for revisiting the defences, as a consequence of broadening the meaning of the foreign courts' jurisdictional competence, is to ensure that the rights of the judgment debtors are not unduly trampled on. Tempting though it might be to think that the widening of the ambit of international jurisdictional competence under the corresponding jurisdictional bases model should lead to a revision of the defences, it is argued that it would be unnecessary.

Defences to the recognition and enforcement of foreign judgments at common law seek to ensure that any instances of serious unfairness or injustice, which could arise from giving effect to the foreign courts' judgments in England, are avoided.<sup>93</sup> While by no means definitive, the defences nevertheless cover a wide range of circumstances in which the recognition or enforcement of the foreign judgment could be regarded as occasioning serious

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<sup>91</sup> A Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law of Foreign Judgments' (2004) 8 SYBIL 1.

<sup>92</sup> Ibid, at 14. See, similar remarks in LeBel J's dissenting judgment in *Beals*, above n 44, at [212]-[218].

<sup>93</sup> See, similarly, *Beals*, above n 44, at [41] per Major J.

unfairness or injustice. For example, foreign judgments obtained by fraud, or in breach of the principles of natural and substantial justice, would not be given effect against the judgment debtor's assets in England. Likewise, if enforcing the judgment would contravene the English public policy or is, otherwise, precluded by the operation of the Human Rights Act 1998, then it would be resisted by the English courts. It must follow, therefore, that it is only if the introduction of the corresponding jurisdictional bases model is likely to give rise to novel instances of serious injustice, which are not currently protected against, that the defences to the recognition and enforcement of foreign judgments should be reconfigured.

It is true that the corresponding jurisdictional bases model conceives of the notion of the foreign court's jurisdictional competence in a wider sense than is presently the case. However, it is argued that, its adoption would not, in itself, lead to the emergence of new forms of serious inequity or injustice to warrant the revision of the existing defences. Put differently, even in the most extreme circumstances, the type of unfairness which might occasion from the recognition and enforcement of foreign judgments under this article's favoured reform option are not wildly different from those which may arise under the existing regime in this area. In support of this contention, it might be helpful, at this juncture, to recite the two hypothetical examples set out earlier:

1. While on a visit to a trade fair in California, A and B entered a contract. Subsequently, a dispute ensued between the parties which prompted A to begin an action for breach of contract against B in California. Except for the fact that the agreement had been made within California, the parties and/or the dispute have no connection with that forum. In due course, the Californian court hands down its judgment in favour of A. A, then, wants to enforce the Californian court's judgment against B's assets in England. Based on the corresponding jurisdictional bases model, the Californian court would be jurisdictionally competent, in the eyes of the English conflict-of-laws rules, by virtue of the corresponding application of CPR PD 6B para 3.1(6)(a). Thus, *prima facie*, its judgment would be capable of enforcement in England.

2. X and Y entered into a contractual agreement through Z, X's New York-based agent. Sometime thereafter, X commenced breach-of-contract proceedings against Y in New York. Aside from Z's domicile, no other factor connects the case and/or the parties to New York. In due course, the New York court grants a judgment against Y, which X now seeks to enforce in England. If the corresponding jurisdictional bases model were to be in operation in England, the New York court would be considered as having international jurisdictional competence, pursuant to CPR PD 6B para 3.1(6)(b), and its judgment would be, *ceteris paribus*, enforceable in England.

Let us assume that, in both of these examples, there is no scope for the application of any of the current defences to the recognition and enforcement of the judgments. In these circumstances, it is argued that, other than the (unappealing) fact that the judgments in question were rendered by courts with minimal connection with the dispute, it is hard to think of any possible ground for hesitation on the part of the English court in enforcing the judgment. Though understandable, this misgiving is surely not of a magnitude to warrant the conception of a new defence to the recognition and enforcement of foreign judgments. After

all, if giving effect to a foreign judgment, rendered by a court with the weakest of connections to the parties and/or the dispute, were so undesirable that needed to be countered by a defence, then the English law would have developed one long ago for instances where the foreign court's competence derives from the judgment debtor's mere (and fleeting) presence in the forum at the commencement of the proceedings. In short, it is argued that the reformulation of the common law recognition-and-enforcement regime in line with the corresponding jurisdictional bases model does not lead to new forms of serious inequity or injustice to necessitate the revision of defences in this area. The defences, as currently defined, are sufficiently wide in their scope to counter any potential unfairness which might arise to the judgment debtor from expanding the foreign courts' international jurisdictional competence by including within it the CPR jurisdictional gateways.

It would be wrong to claim that reformulating the common law principles on the recognition and enforcement of foreign judgments based on the corresponding jurisdictional bases model would be without drawbacks. Be that as it may, it is argued that, by helping to attain the broader policy objectives of certainty and fairness between the parties, it provides a more compelling doctrinal framework for reformulating the common law recognition-and-enforcement regime than the status quo and, indeed, the other models that have been proposed at various stages over the past 30 years. Accordingly, it is contended that embracing the corresponding jurisdictional bases model would help to significantly improve this aspect of the English private-international-law rules.

## CONCLUSION

The main aim of this article has been to reconsider the English common law rules on the recognition and enforcement of foreign judgments *in personam*. These rules have been a longstanding feature of conflict of laws in England (and elsewhere in the common law world). By far, the most significant condition within the common law regime for giving effect to foreign judgments in England is the existence of international jurisdictional competence on the part of the foreign court, as defined under English law.

As the preceding discussion highlighted, the circumstances in which a foreign court is regarded as being jurisdictionally competent in recognition-and-enforcement cases are reasonably clear. Nonetheless, several problems can be identified with the operation of the law in this area. These problems have arisen mainly due to the narrow manner in which the foreign courts' jurisdictional competence has been defined at common law. As the analysis, then, demonstrated, in response to these shortcomings, three reform options have been advocated over the past 30 years. However, in the final analysis, it was argued that, in spite of their merits, none of them provides the compelling doctrinal basis for reformulating the law.

In these circumstances, the final substantive part of this article advanced an alternative option for reforming the recognition-and-enforcement rules at common law. A number of arguments were presented in support of the view that the most prudent way forward would be to expand the scope of jurisdictional competence, in the context of common law recognition-and-enforcement cases, to include the jurisdictional gateways



codified within CPR PD 6B para 3.1. Based on this framework, which was labelled as the corresponding jurisdictional bases model, the CPR jurisdictional gateways would supplement presence and submission as the relevant grounds for establishing competence on the part of the foreign courts. Therefore, regardless of the jurisdictional ground(s) on which the foreign judgment was rendered, if the connection between the defendant and/or the claim and the foreign court was such that, had it been with England, it would have fallen within a corresponding CPR gateway, then the foreign court should be regarded as being competent. It is argued that this development in the law would be a long-awaited step in the right direction in addressing the problematic implications of the existing recognition-and-enforcement regime at common law.